81-139

No._____

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IN THE

Supreme Court of the United States

October Term, 1981

THE NARVA HARRIS CONSTRUCTION CORP.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Question Presented

Whether, under the doctrines of equitable estoppel, *quantum meruit*, and contract implied-in-fact, the United States can escape payment of the certified additional construction costs of a completed and approved low income housing project when Petitioner, a minority contractor, was induced to undertake the project by oral assurances from HUD officials, which were corroborated and unchallenged at trial, that certified cost overruns would be paid.*

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* Pursuant to Rule 28.1, the Court is advised that there are no parent companies, subsidiaries or affiliates of Petitioner.

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IN THE

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No. _____

THE NARVA HARRIS CONSTRUCTION CORP.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, The Narva Harris Construction Corp., prays that a writ of certiorari issue to the United States Court of Claims to review the judgment of that court in affirming the opinion, findings of fact, ultimate findings of fact and conclusion of law of the trial judge.

Opinion Below

The Opinion of the trial judge, filed September 12, 1980 (App. 15-38) is not officially reported. The *per curiam* Order of the United States Court of Claims, filed April 21, 1981 (App. 39-40), is not yet officially reported.

Jurisdiction

The Opinion and Order of the United States Court of Claims was entered April 21, 1981 (App. 39-40). A timely petition for rehearing was denied on May 29, 1981 (App. 41). The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

Statutory Provisions Involved

The Tucker Act, 28 U.S.C. §1419 provides, in relevant part, as follows:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The pertinent portion of Title 31, United States Code, Section 200(a)(1) provides:

> "... no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—
>
> (1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed; ..."

Statement

Prior to 1971, Petitioner entered into negotiations with Center Post Housing, Inc., the Presbyterian-University of Pennsylvania Medical Center, and representatives of the Philadelphia Regional Office of the Department of Housing and Urban Development (HUD) to provide the services of a general contractor for the development of low income housing to be known as the Center Post Housing Project. By September of 1971, before any written contracts were executed, Petitioner advised HUD that a preliminary investigation had demonstrated the cost figures required by Respondent to be less than reasonable and necessary to develop and construct the project. Representatives of HUD thereupon told Petitioner that the contracts would have to be drafted with the lower figures, to get the project underway, but assured Petitioner that these cost figures would be increased at a later date in accordance with applicable HUD mortgage increase procedures so long as any additional costs were certified.

Relying on these representations, Petitioner proceeded with the project, and satisfactorily completed it. Despite the submission and acceptance by HUD of certified cost overruns, the mortgage insurance was not raised and costs were not adjusted to reflect the additional costs of construction in the amount of $225,717.00 which Petitioner seeks to recover.

The Court of Claims affirmed the trial judge's findings that the evidence did not show that HUD's failure to insure an increased mortage on the project amounted to a breach of contract.

Petitioner, The Narva Harris Construction Corp., now petitions this Court for a writ of certiorari to review the opinion and Order of the Court of Claims.

REASONS FOR GRANTING THE WRIT

The trial judge found, and the *per curiam* Order of the Court of Claims affirmed, although without mentioning most of Petitioner's corroborated and unchallenged facts from which a "meeting of the minds" could reasonably be inferred, that "[t]here is no credible evidence in the record showing that Mr. Gallagher, Mr. Connell or any other HUD or FHA representative stated or implied that the mere fact of a certified cost overrun constituted a sufficient basis for increasing the level of mortgage insurance." (App. 29). By adopting the trial judge's opinion, the Order of the Court of Claims has compounded the manifest error of law committed by the trial judge who not only ignored material aspects of the evidence but also ignored the decisions of this Court, and other circuit courts, which hold that a fact-finder is not at liberty to disregard, without a detailed explanation of reasons, clear, positive, uncontradicted and unchallenged testimony which is not inherently improbable.

Moreover, by totally ignoring Petitioner's alternative theories of recovery under the doctrines of equitable estoppel and *quantum meruit*, the decisions of the trial judge and the Court of Claims are unjust, unreasonable and plainly wrong.

I. The decision below is shockingly wrong and unduly harsh in its impact in that equity and fair dealing require the United States to be estopped from repudiating its acknowledged obligations; otherwise the United States has acquired a fully completed and approved housing project at a cost less than its actual value and at the expense of a minority contractor.

The uncontradicted, unrebutted, unimpeached and unchallenged testimony of Petitioner's president, Narva L. Harris, Jr., was that in May 1970 he submitted a Cost

Breakdown for the proposed project (P-6). Despite an acknowledged awareness of a drastic increase in construction wage rates and costs of materials (P-2 and P-3) representatives of HUD would only accept, approximately 15 months later on September 1, 1971, the original Cost Breakdown figures (N.T. 20-26; 186-7; 192-3; 195; P-1[c]). HUD's position was rationalized on the basis that various internal regulations dictated the amount allocated for the construction of this project (N.T. 29-30). All meetings where the focus of the discussion was on resolving cost differentials between Petitioner's Cost Breakdown and HUD figures were conducted in the offices of HUD, and Mr. Gallagher and/or Mr. Connell, the HUD representatives, were the individuals with authority to resolve this cost dispute (N.T. 31-32). There were numerous meetings between Mr. Harris and various HUD officials in 1970 and in 1971 which eventually culminated in a meeting on April 29, 1971 at which time it was agreed that Mr. Harris would proceed with the construction of the Center Post Housing Project and HUD agreed to increase the mortgage if necessary upon submission of a final cost certification (N.T. 33-39). The following positive assurances, inducements and promises were made to Petitioner by Mr. Gallagher, the HUD Area Director, in the presence of two other HUD officials, Mr. Connell and Mr. Rementer:

(By Mr. Burr):

Q. Then, at or before this April 29, 1971 meeting, what was the nature of the understanding you had with HUD officials with respect to proceeding on the Center Post Project?

A. That we would proceed with the construction of the project and that the mortgage *would* be extended based upon the final cost certification of the project.

* * *

Q. Were you ever successful in convincing HUD to raise their figures that they would accept to build the Center Post Housing Project in accordance with the figures you submitted?

A. No.

Q. You nevertheless proceeded to build the project, is that correct?

A. Yes.

Q. Did HUD make any assurances or promises to you in order to induce you to proceed with that project?

A. Yes.

Q. What were those assurances and inducements or promises that HUD made to encourage you to build the Center Post Project?

A. Both parties, HUD and Center Post Project, were interested in getting their project going fast. What they said to me was that if we proceeded on the basis of this cost breakdown that there were regulations that allowed them to increase the mortgage provided the cost certification indicated that a mortgage increase was necessary in order to cover all of the costs, and on that basis, I proceeded to do the contract.

Judge Willi: When did you get these assurances, was this at the April 29—

The Witness: As near as I can remember, this was on this April 29 meeting.

By Mr. Burr:

Q. *And as far as you were concerned, as long as you provided and submitted certified costs from an independent C.P.A. then you understood it to mean that the mortgage would be granted and you in turn would be paid?*

A. *Yes.*

Q. *Who made that statement to you?*

A. *Mr. Gallagher.*

Q. *The Area Director?*

A. Not only to me, he made it to the group of people there.

Q. But he's the one that made the statement?
A. Definitely.
Q. And tell us once again, if you haven't already, who was at that meeting from HUD?
A. Mr. Gallagher, Mr. Connell and Mr. Rementer, at least, and there may have been other people that I don't remember. (N.T. 38-41) (emphasis added).

The cost certification submitted by Mr. Harris was accepted by HUD (N.T. 46; P-1(d); P-1(e)). However, the mortgage was never increased and Mr. Harris was never paid in full for the successful completion of the Center Post Housing Project containing 84 living units which have been occupied since early 1972 (N.T. 46-47). As a result of the successful completion of this project Mr. Harris has incurred losses in the total amount of $225,717.00 (N.T. 47-48; P-5).

Mr. Harris personally reviewed the HUD files for at least three other similar projects involving non-minority contractors wherein mortgage increases were granted for reasons virtually identical to the instant case based on certified costs overruns and Respondent, despite the trial judge's invitation (N.T. 54), never attempted to discredit any of this testimony (N.T. 52-56).

The testimony of Mr. Harris was corroborated by the uncontradicted, unrebutted, unimpeached and unchallenged testimony of Maurice Hertzfeld who attended the April 29, 1971 meeting which included the Area Director, Mr. Gallagher, whom he had known from previous experience in dealing with HUD. At this meeting Mr. Gallagher stated that there was a great urgency for this project to proceed and he suggested that construction commence based on the HUD estimate and if, in fact, Mr. Harris completed the job and could justify the cost overruns it was the usual FHA procedure to grant a mortgage increase (N.T. 137).

As a result of these representations, Mr. Hertzfeld asked to speak with Mr. Connell privately because, as the Chief Underwriter for multi-family housing, Mr. Connell ultimately had the final recommendation for approving or disapproving mortgage guarantees (N.T. 138-139). Mr. Hertzfeld specifically asked Mr. Connell whether there were any other projects either recently completed or under construction in the City of Philadelphia where mortgage increases were granted to cover additional costs as long as they were certified by an independent CPA, and Mr. Connell spelled out the same three non-minority projects to which Mr. Harris referred in his testimony (N.T. 142; 52-56). Mr. Hertzfeld's purpose in meeting with Mr. Connell was to confirm whether, in fact, FHA intended to follow this procedure and Mr. Connell assured him by stating: "... *you know me, I am the chief underwriter. When that comes before me I will approve the project ... approve the increase in the mortgage amount ... which in turn would cover the increase in costs ... you are not taking any risk because we (HUD) are able to increase the amount of mortgage upon proof that the materials and labor was actually spent in the project in the form of certified costs.*" (N.T. 147-148) (emphasis added). In order to insure that Center Post and the Hospital [the only entities with standing (N.T. 100)] would make application, supported by cost certifications, to HUD for the mortgage increase [which the United States never challenged and, indeed, accepted (N.T. 46)], Petitioner entered into separate agreements with those parties (D-2; D-3); *Cf.* (App. 32-34).

The foregoing recital of testimony, while regrettably lengthy, nevertheless demonstrates the harshness of the decision below which completely overlooked the doctrine of equitable estoppel and the appropriateness of that doctrine, under the facts of this case, to prevent the

United States from denying the existence of a contractual agreement. *Russell Corp. v. United States*, 537 F.2d 474 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 1073 (1977); *Manloading & Management Associates, Inc. v. United States*, 198 Ct. Cl. 628, 461 F.2d 1299 (1979). For the doctrine of equitable estoppel to apply, the facts must show the presence of the following elements: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *Russell Corp. v. United States, supra*, at 484. Thus, the Petitioner must show that:

> "... the party against whom an equitable estoppel is set up acquiesced in the transaction in such a manner as to change the relationship of the parties and make its repudiation of the proceedings contrary to equity and good conscience." *Stevens Manf. Co. v. United States*, 8 F. Supp. 720, 724, 80 Ct. Cl. 183, 192-193 quoted with approval in *Emeco Industries Inc. v. United States*, 485 F.2d 652, 657, 202 Ct. Cl. 1006, 1015 (1973).

It is not, however, essential for the party against whom an estoppel is urged to have made a representation of any kind. *Emeco Industries Inc. v. United States, supra*, at *Ibid.* This view of course, is in accord with those cases which hold that a party who engages in a course of conduct, even without misrepresentation, upon which another party has a right to rely, will be estopped from repudiating the effect of such conduct. See *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970).

All of the essential elements of equitable estoppel are present in this case. First, there is no doubt on this record that the United States knew all of the facts because Petitioner himself related that the cost figures

demanded by HUD were less than reasonable and necessary to develop and construct the Center Post project (N.T. 20-26; 186-7; 192-3; 195). Support for Petitioner's expectations can reasonably be inferred from the course of conduct and/or representations made by Gallagher and Connell, as agents for the United States acting within the scope of their authority, that so long as any additional cost figures were certified, the mortgage would be increased and Petitioner would be paid for his efforts (N.T. 33-39; 40-44; 138-149); second, it was clearly established on the record that Petitioner had a reasonable right to act in reliance on the actions and/or inactions of the authorized agents of the United States which were unquestionably intended to induce Petitioner to so rely; third, Petitioner had no reason to believe that the United States would not live up to its obligations in accordance with the representations made to induce commencement of construction (N.T. 42-44); and fourth, the record establishes that Petitioner relied on the actions and/or inactions of the authorized agents of the United States to its detriment. Manifestly, Petitioner has rendered substantial services in building a low-cost housing project, and the United States has acquired a fully completed and approved housing project at a cost less than its actual value.

The conspicuous absence of any consideration by the trial judge or the court below of Petitioner's claim for recovery under the doctrine of equitable estoppel justifies the grant of certiorari in order to avoid the perpetuation of a gross miscarriage of justice.

II. By overlooking Petitioner's claim for recovery on an implied contract for a *quantum meruit*, the decision below is unjust, unreasonable and plainly wrong.

Even assuming *arguendo* that 31 U.S.C. §200(a)(1) precludes recovery by Petitioner on the basis of an express oral agreement this Court has held in *Clark v. United States*, 95 U.S. 539 (1877), that an unenforceable oral contract does not prevent a recovery in *quantum meruit* for the value of services rendered. This, in essence, is all which Petitioner asks. There is no doubt that Petitioner rendered substantial services in building a low-cost housing project, that the United States benefited by having its policy of providing such housing implemented, that the United States has acquired a fully completed housing project at a cost less than its actual value, and that the United States has been unjustly enriched at Petitioner's expense. Therefore, recovery of the excess of certified costs over the mortgage amount would be, in effect, a recovery in *quantum meruit* for the value of services rendered. See, *e.g.*, *Prestex Inc. v. United States*, 162 Ct. Cl. 620, 628-630, 320 F.2d 367, 373-74 (1963); *New York Mail & Newspaper Transp. Co. v. United States*, 139 Ct. Cl. 751, 154 F. Supp. 271, *cert. denied*, 355 U.S. 904 (1957); *Forest of Dean Iron Ore Co. v. United States*, 106 Ct. Cl. 250, 65 F. Supp. 585 (1946) which hold that where the Government takes the benefit of another's property a finding of implied authority or ratification by Government authorities is warranted.

The decision of the trial judge and the Court of Claims, which overlooked the *quantum meruit* theory of recovery asserted by Petitioner, cannot be justified by reason, common sense, logic or decisional authority. This Court, therefore, should grant certiorari to prevent a subtle erosion of established legal precedent.

III. Petitioner adduced sufficient evidence from which a meeting of the minds could reasonably be inferred to support a finding of a contract implied-in-fact and therefore arbitrary rejection of Petitioner's clear, positive, uncontradicted testimony, which was not inherently improbable, without a detailed explanation of the reasons for rejection, directly conflicts with decisions of this Court, other courts of appeals and the Court of Claims.

This Court and other federal courts have clearly established that a fact finder is not at liberty to disregard, in the absence of a detailed explanation of reasons, clear, positive and unimpeached testimony which is not inherently improbable. *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209 (1931); *White Glove Building and Maintenance Inc. v. Brennan*, 518 F.2d 1271, 1273-4 (9th Cir. 1975); *Pueblo De Zia v. United States*, 165 Ct. Cl. 501 (1964). This evidentiary principle is essentially true if the cross-examination does not develop any conflict and the United States produces no testimony in opposition. Under these circumstances, the trier of fact in a non-jury case is not justified in arbitrarily and capriciously disregarding such testimony. *Pueblo De Zia v. United States, supra.*

Even in the context of a jury trial, this Court has held in *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209 (1931), in language which is singularly relevant here in support of Petitioner's position that:

> "... the court ... is not at liberty to disregard the testimony of a witness on the ground that he is an employee of (a party), in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as to the truth of his statement, unless the evidence be of such nature as

fairly to be open to challenge or suspicious or inherently improbable."

* * *

"We recognize the general rule, of course, . . . that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt." 283 U.S. at 214, 216.

Neither the trial judge nor the Court of Claims pointed out any inherent improbability or contradiction in Harris' testimony. A reading of the record discloses no lack of candor on his part. His testimony was not shaken on cross-examination; indeed, there was no effective cross-examination on the material points at issue. Not only is the fact that Petitioner proceeded with construction of the Center Post project reasonable on its face and in accordance with probability; and not only is it wholly unchallenged by other evidence or circumstances; but also it is so completely corroborated by the undisputed facts with respect to the completion and acceptance of this project by the United States that the decisions below are tantamount to an arbitrary and capricious rejection of uncontradicted evidence clearly establishing a contract implied-in-fact.

This Court, therefore, should grant certiorari to review the doubtful determination of the court below. At the very least, the lower court judgments should be reversed and the case remanded for findings which articulate in detail the reasons for rejecting the material aspects of Petitioner's testimonial and documentary evidence.

Conclusion

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion in the United States Court of Claims

IN THE
UNITED STATES COURT OF CLAIMS

Trial Division

Nos. 407-76 and 422-76

(Filed: September 12, 1980)

NARVA HARRIS CONSTRUCTION CORP.

v.

THE UNITED STATES.

Breach of contract; failure of proof.

Charles B. Burr, II, attorney of record for plaintiff. Griffith and Burr, P.C., of counsel.

John Charles Ranney, with whom was Assistant Attorney General Alice Daniel, for defendant.

OPINION*

WILLI, *Trial Judge:* Plaintiff, a construction contractor, sues[1] to enforce the alleged oral promise of former officials of the Philadelphia office of the Department of

* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

[1] As detailed in finding 1, *infra*, these suits, consolidated for purposes of all proceedings in this court, came here by transfer under 28 U.S.C. §1406(c), from the U. S. District Court for the Eastern District of

(Footnote continued on following page)

Housing and Urban Development (HUD)[2] to compensate for cost overruns by raising the amount of insured mortgage financing that it originally approved as an incentive to private interests to undertake each of two separate low-income housing projects in the Philadelphia area, one for the renovation of the Kemble Park Apartments, the project involved in No. 422-76, and the other, the subject of No. 407-76, for the construction of an apartment complex for Center Post Housing Inc., (Center Post), a wholly-owned subsidiary of the Presbyterian-University of Pennsylvania Medical Center (Medical Center). Plaintiff, operating under fixed-price contracts, was the general contractor for both projects.

After petitions and answers were filed in these cases, the defendant moved for summary judgment on the grounds that plaintiff lacked privity with HUD and that it had not shown authority to bind on the part of the HUD officials who had allegedly promised mortgage insurance increases should cost overruns occur.

(Footnote continued from preceding page)

Pennsylvania. The first count in each of the three-count petitions seek damages for breach of contract. Finding 2, *infra*. Proceedings herein (*see* Order of Trial Judge Under Rules 111(a) and 131(a), entered January 25, 1977), including this opinion, have necessarily been confined to those counts because the second and third counts in each instance, charging conspiracy and racial discrimination, respectively, sound in tort and are therefore beyond the jurisdiction of this court. 28 U.S.C. §1491, *Madison* v. *Wood*, 410 F.2d 564, 567 (6th Cir. 1969). Consequently, it is contemplated that upon entry of final judgment on count one of each of the petitions the suits will be returned to the district court.

[2] In the record herein the names Federal Housing Administration (FHA) and Department of Housing and Urban Development (HUD) are variously used to describe the same governmental entity. On September 9, 1965, the functions, powers and duties of FHA were transferred to HUD. Pub. L. No. 89-174, 79 Stat. 669.

By an order of September 30, 1977, the court denied the defendant's motion and in so doing called attention to 31 U.S.C. §200, indicating that inquiry into the merits of an alleged oral contract would be a wasteful exercise if the defendant's position were that the referenced statute made an oral contract unenforceable in any event.

Thereafter, the defendant again moved for summary judgment, this time on the basis of 31 U.S.C. §200. The court denied the motion, noting that a full development of the facts might vindicate plaintiff's right to recover *aliunde* an oral agreement, *viz.*, by way of an implied-in-fact contract or *quantum meruit*. *Narva Harris Construction Corp.* v. *United States*, 216 Ct. Cl. 238, 574 F.2d 508 (1978).

Following extensive pretrial proceedings a trial was held, the results of which are reflected in the findings of fact that accompany and are integral to this opinion. They are so because the facts are determinative of all issues presented.

As to No. 422-76, dealing with plaintiff's contract to renovate the Kemble Park Apartments, plaintiff's claim must fail because of an almost complete failure of proof. In addition to showing nothing to indicate that cost overruns were in fact experienced, plaintiff adduced no proof showing that HUD was even asked, much less refused to insure a mortgage larger than that approved for the project at its inception. Finding 4, *infra*. The proof did establish that plaintiff satisfactorily completed the project, finding 4, *infra*, and the defendant has shown no reason why it should not inform the First Federal Savings and Loan Association of Philadelphia that the project was successfully completed so that the

security deposit held by that institution may be released in accordance with the mortgage escrow agreement that created it. Findings 5 and 6, *infra.*

As to No. 407-76, the applicability and effect of 31 U.S.C. §200 does not become an issue because the evidence shows both (1) that no HUD official promised plaintiff that cost overruns on the Center Post housing project would be accommodated by an increase in the insured mortgage by which the project was originally funded, finding 22, *infra,* and (2) that, accordingly, plaintiff looked to Center Post, not HUD, to indemnify it against the impact of cost overruns on its fixed-price contract. Findings 27 and 28, *infra.* Plaintiff completed the contract, finding 29, *infra,* and defendant has shown no reason why it should not notify First Federal Savings and Loan Association of Philadelphia that it approves disbursement of the escrow fund by that institution in accordance with the terms of the Escrow Deposit Agreement by which the fund was created. Findings 29, 30, 32 and 34, *infra.*

In sum, the evidence does not show that HUD's failure to insure increased mortgages on either of the construction projects involved in those two consolidated cases amounts to a breach of contract.

FINDINGS OF FACT

1. These companion cases originated in the Court of Common Pleas of Philadelphia County. On May 15, 1975, on motion of the United States, they were removed to the U. S. District Court for the Eastern District of Pennsylvania and docketed there as Civil Action Nos. 75-805 and 75-806. Thereafter, by an order entered September 9,

1976, the suits were transferred to this court pursuant to 28 U.S.C. §1406(c).

2. On October 27, 1976, two three-count petitions were filed here, Nos. 407-76 and 422-76. The claim asserted in count one of each of the petitions is an alleged breach by the Department of Housing and Urban Development (HUD) and its affiliate, the Federal Housing Administration (FHA), of an oral commitment to plaintiff to increase the amount of mortgage insurance initially extended to each of two housing projects constructed by it should plaintiff's costs exceed the amount of the approved construction budget for each of the projects. No. 422-76 concerns a project to renovate the 50 units of the Kemble Park Apartments in Philadelphia, and No. 407-76 involves the construction of an 84-unit apartment complex under the auspices of the Presbyterian-University of Pennsylvania Medical Center (Medical Center) located in the same city. The second and third counts of each of the petitions are variants of the first in that they seek damages for HUD's allegedly tortuous and discriminatory refusal to increase its mortgage guarantees on the same projects. In these circumstances, on January 25, 1977, the trial judge entered an order under Rules 111(a) and 131(a) consolidating the cases for purposes of all further proceedings in this court and suspending proceedings on the second and third counts of both of the petitions pending final adjudication of the claims asserted in count one thereof.

3. Plaintiff, formed as a Pennsylvania corporation in 1970 (as a successor to a limited partnership), operated as a contractor in the light contruction field until December 1974, when it became inactive because of a

lack of sufficient operating funds to meet its obligations to various subcontractors and material suppliers.

No. 422-76

4. Plaintiff has adduced virtually no evidence concerning its acquisition and performance of its contract to renovate the Kemble Park Apartments. In that connection plaintiff's only evidence consisted of the unchallenged and unrebutted testimony of Mr. Narva Harris to the effect that the contract was fully completed. Further, plaintiff has adduced no proof that HUD, or anyone acting on its behalf, ever agreed to increase the amount of mortgage insurance that it initially authorized with respect to the Kemble Park renovation project. Beyond that, plaintiff's counsel and principal witness at the trial both acknowledged that HUD had never been asked to increase such insurance.

5. As a part of the mortgage financing for the Kemble Park project an escrow deposit agreement was executed on November 26, 1974, by the mortgagor, Adventurers, Inc., and the insured mortgagee (also identified in the agreement as the "Depository"), First Federal Savings and Loan Association of Philadelphia. The stated purpose of the agreement was to secure the mortgagor's completion of the project. To that end, the sum of $34,315 was deposited by Adventurers with the mortgagee-depository subject to the provision that, upon written approval of the project by the FHA, the fund would be returned to the mortgagor. The agreement further stipulated that should the mortgagor fail to timely complete the project the fund would be paid to the mortgagee for disposition by it as directed by the FHA.

Plaintiff was not a party to the escrow agreement and is nowhere mentioned in it.

6. Notwithstanding its failure to dispute or in any way discredit Mr. Harris' testimony that the Kemble Park renovation contract was fully completed, defendant has offered no evidence to justify or otherwise explain the basis for its failure to date to furnish First Federal Savings and Loan with a written approval or disapproval of the project so that the escrow fund could be distributed or applied in the manner specified by the agreement that created it.

7. On June 27, 1979, the mortgagee-depository, First Federal Savings and Loan Association of Philadelphia, held $28,411 pursuant to the escrow agreement described in finding 5, *supra*.

8. On January 6, 1977, the trial judge allowed, without objection by defendant, plaintiff's motion under this court's Rule 41 for issuance of a notice to Adventurers, Inc. and to the Philadelphia Council for Community Advancement, the sponsor of the Kemble Park renovation project. On March 18, 1977, after service of the notice on them, those third parties filed a motion to quash. On April 19, 1977, plaintiff having neither objected nor otherwise responded, the motion to quash was allowed.

9. Plaintiff's stock is owned in equal parts by three individuals; Mr. Narva Harris, a graduate architect who at the time that plaintiff was formed, had 18 years' experience as a general contractor specializing in light construction and Messrs. Maurice Hertzfeld and Irwin

Horowitz who had formed a partnership in 1961, Hertzfeld and Horowitz Associates (Associates), to conduct a general real estate business in the Philadelphia area. Messrs. Hertzfeld and Horowitz advanced Mr. Harris the amount of his equity investment and that advance has never been repaid.

10. By the late 1960's, Associates had become a major producer of low-income housing for the Philadelphia Housing Authority. Much of that activity was financed directly or indirectly by HUD. In addition, the firm had developed a business relationship with the University of Pennsylvania. It served as a consultant on real estate matters, including construction projects, and managed various University-owned properties located on the periphery of the campus.

11. A portion of the record transferred here from the U. S. District Court for the Eastern District of Pennsylvania, in Civil Action No. 75-805 before that court (No. 407-76 in this court) consists of plaintiff's answers, filed January 26, 1976, to defendant's interrogatories. Accompanying those answers are a great number of documentary exhibits consisting principally of copies of various correspondence. To the extent relevant to the issues here involved those materials are deemed admissible evidence in this case and therefore constitute appropriate support for findings of fact made in this proceeding.

12. In the mid-1960's, the Presbyterian-University of Pennsylvania Medical Center (Medical Center) became interested in exploring the possibility of providing, without

cost to itself, some low-income residential housing on land, then owned by the Philadelphia Redevelopment Authority, near the medical facility. Associates, working with Mr. Carl L. Mosher, executive vice president of the Medical Center, became actively involved in the planning effort. This working relationship culminated in a service agreement, dated October 3, 1969, between the Medical Center and Associates.

13. It was determined that ownership of the planned development should be in a not-for-profit corporation. To that end, the Medical Center formed such a corporation as a wholly-owned subsidiary. The name given it was Center Post Housing, Inc. (Center Post).

14. The record herein does not include the Service Agreement of October 3, 1969, mentioned in finding 12, above. As reflected by a letter of June 11, 1970, from Carl L. Mosher to Associates, however, the agreement committed the latter to (a) perform certain services in relation to the proposed project, including submission of FHA applications and doing all things required by FHA to enable the project to proceed to completion, and (b) to assume the liability of the Medical Center and that of the Center Post under any contracts entered into pursuant to the service agreement should Associates fail to obtain 100 percent financing of the project. Under the agreement, Associates was to be the builder of the project.

15. As originally conceived, the plan was to construct low-income housing with FHA insured financing and rent supplement under section 221(d)(3) of the National Housing Act. In March 1969, the FHA issued a feasibility let-

ter for the proposed project on the assumption that it would be operated under the rent supplement program. The letter is not in evidence but the testimony establishes that such a letter is concerned not at all with construction costs but solely with a determination of the maximum capital outlay that revenues to be generated by the projected facility will support.

16. As reflected by a letter of May 15, 1970, written by Carl Mosher to the various persons involved in development and execution of the proposal to construct housing for low-income individuals under FHA's rent subsidy or supplement program, on May 13, 1970, the addressees participated in a meeting at which Mr. Hertzfeld informed the group that Associates' cost of construction for the proposed 84-unit project, exclusive of all fees, general field expenses, site development and start-up expenses, totaled $894,000. It was recognized that full financing on that basis would require a mortgage commitment of $1,300,000, that being well in excess of the total outlay set forth in the FHA's feasibility letter of March 1969. In those circumstances, Mr. Hertzfeld and Mr. Donald J. Reape, the representative of the proposed mortgage lender, recommended to the group that it not even apply to FHA for a mortgage commitment based on a rent subsidy approach. They recommended instead that the project be proposed under an interest subsidy approach which permitted substantially higher monthly rental charges to tenants because that program envisioned only 20 percent of the tenant-occupants with incomes so limited as to qualify them for public housing. The remaining tenants could be charged rents at the higher prevailing rates. Under the interest

subsidy approach Center Post Housing, instead of Associates, would be the builder of the project. Associates' role in the undertaking therefore shifted from that of prime contractor to paid consultant. This shift, however, did not relieve Associates of its obligation under the Service Agreement to bring about a fully financed, complete housing facility. It was therefore necessary for Associates to recruit a qualified building contractor satisfactory to the Medical Center.

17. By a letter of June 11, 1970, signed by Carl Mosher, the Medical Center approved the change in application to the FHA from one of assistance under section 221(d)(3) of the Housing Act (rent supplement) to one for assistance under section 236 (interest supplement).

18. Maurice Hertzfeld became acquainted with Mr. Narva Harris when the latter became the first black man to be admitted to the Philadelphia Home Builders Association. At that time Mr. Harris' contracting work was primarily in the area of renovation and rehabilitation of existing structures. The two men served together on the Association's Rehabilitation Committee and found that their respective views and objectives in the rehabilitation area coincided. It was on the strength of that relationship and Mr. Hertzfeld's awareness of the general mood in the community favoring minority participation that plaintiff was formed and proposed to the Medical Center as contractor for the project. Since Associates comprised two-thirds of plaintiff's ownership, the Medical Center, not surprisingly, accepted the proposal.

19. In May 1970, in anticipation of the Medical Center's approval of plaintiff's designation as prime contractor, Mr. Harris drew up a cost analysis for the 84-unit complex and associated site improvements. For those items the analysis reflected a total direct cost of $935,958. To that figure plaintiff added $143,059 for overhead and profit thereby arriving at a total price of $1,079,017. At some undetermined time later in 1970, Mr. Harris, on behalf of Center Post, submitted this cost analysis to Mr. Dan Falls, a so-called cost processor with HUD. The evidence indicates that the role of a cost processor is to determine the reasonableness of the costs proposed to be incurred for the construction of a given facility. As its standard of reasonableness HUD typically relied on costs that had been incurred in comparable construction that had been undertaken with its financial assistance and had been completed. Those historical costs were then updated by the application of an adjustment factor intended to compensate for any intervening increase that had occurred. The record does not reflect the details of the adjustment mechanism.

20. Mr. Narva Harris had several meetings with Mr. Falls in an effort to persuade him to approve plaintiff's version of reasonable construction costs for the proposed project. So far as the record discloses, the only specific cost proposal that plaintiff submitted to Mr. Falls was that prepared by Mr. Harris in May 1970, as detailed in the preceding finding. Although the thrust of Mr. Harris' testimony at the trial is to the effect that he was attempting to persuade Mr. Falls that the $1,079,017 in the May 1970, proposal was unrealistically low because of

subsequent increases in labor and material costs, no evidence of any specific documentation or, indeed, contentions in support of that alleged effort to so persuade Mr. Falls has been adduced by plaintiff. In any event, the Harris-Falls discussions culminated in HUD's issuance of a feasibility letter on December 31, 1970. In pertinent part, that the letter stated:

> The maximum project cost supportable by the economies of this proposal is indicated to be $1,306,984 distributed as follows:
>
> | | |
> |---|---|
> | FHA Land Value (with offsite improvements installed) | $ 29,500 |
> | Carrying Charges and Financing | 185,050 |
> | Legal and Organizational Expense | 7,200 |
> | Design Architect | 32,177 |
> | Supervisory Architect | 12,148 |
> | Bond Premium | 6,941 |
> | Other Fees | 1,500 |
> | Construction Budget, including builder's of $83,719 | $1,032,468 |
>
> Your architect should be fully aware of the significance of the project construction budget (or project rehabilitation budget, if applicable), which is the upper limit available for construction (or rehabilitation) recognized by FHA. The insurable mortgage will not exceed $1,306,900.

21. Dissatisfied with the size of the construction budget approved in the December 31, 1970, feasibility letter, plaintiff caused a meeting to be convened on April 29, 1971, at which those in attendance included represen-

tatives of HUD; Mr. Thomas J. Gallagher, area director, and Mr. John Connell, assistant chief underwriter, representatives of the Medical Center; Mr. Carl Mosher and Mr. H. A. Schroedel who was both a member of the Center's Board of Trustees and a retired vice president of the Turner Construction Company, and representatives of the plaintiff; Mr. Narva Harris and Mr. Maurice Hertzfeld.

22. At the meeting described above Mr. Harris took the position that he could not construct the proposed project within the construction budget figure of $1,032,468 set forth in the HUD feasibility letter of the previous December. Mr. Gallagher was anxious that the project go forward and, by way of encouragement to proceed, explained that HUD had so-called error in processing regulations that would permit an upward adjustment in construction price in the circumstances defined by those regulations. Mr. Hertzfeld was unclear in his own mind as to just what Mr. Gallagher meant regarding the possibilities for increasing approved costs at the time of completion. Because of this uncertainty he asked to speak privately with Mr. Connell with whom he was acquainted socially and had dealt previously on FHA financing matters, before adjournment of the meeting. This was done and Mr. Connell explained that there were two bases on which increased costs could be approved by HUD or FHA. The first was in the form of change orders which were issued when significant departures from the original plans occurred or when approved amenities increasing the structure's value were added. Mr. Connell explained that the second avenue for securing approval

of excess costs was under the error in processing regulations which accommodated additional costs resulting from such unforeseen causes as vandalism on the job or inadvertent oversight of a cost item in the processing of the contractor's initial application for approval. There is no credible evidence in the record showing that Mr. Gallagher, Mr. Connell or any other HUD or FHA representative stated or implied that the mere fact of a certified cost overrun constituted a sufficient basis for increasing the level of mortgage insurance. At the time of trial Mr. Connell was deceased and Mr. Gallagher incarcerated for malfeasance in office. The record includes the referenced error in processing regulations. These regulations, which are unpublished but are routinely made available to an interested party on request, expressly disapprove mortgage insurance increases to compensate for additional costs except where necessary to "correct substantial error in the original processing" or to accommodate "substantial changes in the approved plans and specifications that have resulted in significant betterments to the mortgage security." The latter of these criteria was implemented in this case when the amount of initially approved mortgage insurance was increased on account of three change orders; $79,165.82 to cover the cost of air conditioning, $7,219.20 to provide wrought iron ground floor window guards and $1,446.08 for 50 fire extinguishers.

23. Plaintiff offered the only documentary evidence that was adduced in this proceeding relative to the positions urged, agreements reached and actions taken at the April 29, 1971, meeting described in the preceding find-

ing. It consisted of a letter dated May 10, 1971, from Mr. H. A. Schroedel, the Medical Center trustee and retired vice president of Turner Construction, to Mr. John Connell, the assistant chief underwriter for HUD/FHA. The opening paragrapah of the letter defines the areas of agreement and disagreement as follows:

> At a meeting on Thursday, April 29, 1971, with all interested parties on the above project present, it developed that *there was a difference of opinion on one single item*, namely, Masonry Work, on the construction cost analysis between FHA and Narva Harris, builder. [Emphasis added.]

As earlier noted, so far as the record reflects, the only cost analysis advanced by plaintiff was that which urged a total construction budget of $1,079,017, as opposed to the figure of $1,032,468 appearing in the HUD/FHA feasibility letter of December 31, 1970.

According to the Schroedel letter HUD was resisting approval of $181,800 for the cost of masonry work. That was the lowest of the three subcontractor bids that plaintiff had obtained and Mr. Schroedel strongly recommended that it be approved.

Plaintiff's proposed construction budget of $1,079,017 utilizes the figure of $177,000 for the cost of masonry work and the record does not reflect the cost for that item that HUD/FHA was prepared to accept at the time of the April 29 meeting.

24. Under date of May 18, 1971, plaintiff, by Mr. Narva Harris, wrote the following letter to counsel for the Medical Center:

It appears that FHA has now agreed to accept our application for a firm mortgage commitment. The construction costs will be in accordance with our estimate submitted in November, 1970. At the last meeting in your office we agreed to accept the construction numbers even though they did not reflect an increase to cover the current year's wage and material increases.

We agreed at that time that FHA would probably compensate us for any excess when the job is completed based on our certified costs. In the event they do not, however, we agreed that the Hospital would guarantee me the difference provided I agreed to lower the builder's fee by 1 percent, thereby absorbing my share of the overage.

I would appreciate your preparing a draft of an agreement as soon as possible.

The significance of the above letter is two-fold; first, it expressly defines and delimits the area of FHA's agreement on construction costs in terms of the $1,079,017 construction budget proposed by plaintiff; and second, it dispels the notion that plaintiff undertook the project in reliance on a solid expectation that if its actual costs exceeded its projections FHA would increase its mortgage guarantee to make up the difference.

25. On July 1, 1971, HUD issued a firm commitment for the insured financing of the Medical Center project. As contrasted with the December 31, 1970, feasibility letter this commitment approved an insured mortgage of $1,408,100 (rather than $1,306,900) and a total con-

struction budget of $1,079,156 (rather than $1,032,468). The commitment form bore the following explanation of the increased levels of insured funding:

> This form revised (from feas. estimate) to recognize increased costs anticipated by builder/contractor to completion of the project plus, as directed, accepting masonry costs deemed correct by Mr. H. A. Sch[roe]del after his review of bids and conferences w/bidders. See letter in cost file regarding this masonry bid.

26. On September 1, 1971, plaintiff, by Mr. Narva Harris, executed a contract with Center Post to construct the Medical Center housing project for $1,079,017. (As originally drawn, the contract specified a price of $1,079,156, the total construction figure used in the HUD/FHA commitment form of July 1, 1971, but that figure was stricken in pen with the revised figure inserted and the change initialed by Mr. Narva Harris.)

27. Mr. Carl Mosher, vice president of Center Post, sent plaintiff the following letter, dated September 1, 1971:

> We have today attended the closing with respect to the above captioned matter, at which time we executed and delivered the Construction Contract which provides for the construction of the garden apartment project, the contract price set forth therein having been predicated upon cost estimates submitted by you in November of 1970 to the F.H.A. and subsequently approved by it.

We recognize that those cost estimates do not reflect any anticipated increase in the current year's wages and material costs. Consequently, in the event the final certified cost of labor and materials employed in the completion of the project are in excess of those heretofore approved by the F.H.A., then Center Post Housing, Inc. agrees that it will apply to F.H.A. for an increase in the amount of the mortgage loan which it created today in the principal amount of $1,408,100.

28. The following letter agreement, dated September 1, 1971, was sent to plaintiff by the Medical Center and thereafter endorsed by plaintiff, as indicated:

Reference is made to letter dated September 1, 1971 given by Center Post Housing, Inc. (Center Post) to you, a copy of which is attached hereto, relative to the application which will be made to the F.H.A. by Center Post in the event of increases in certain wage and material costs in connection with the above captioned project.

If the F.H.A. does not approve an increase in the amount of the mortgage loan which would be used to pay the excess costs referred to in said letter, then you agree to reduce the amount of the fee payable to you under the Construction Contract referred to in said letter from the 7% figure allowed by the F.H.A. to 6% in order to absorb your share of such excess costs. The Medical Center in turn will guarantee to you the payment of the excess costs remaining over and above the amount to be paid by

you, provided that the maximum liability of the Medical Center hereunder shall be $70,000. Moreover, you agree that your contribution towards such excess costs will be increased by the amount of any incentive payment which you may receive pursuant to the terms of the afore-mentioned Construction Contract.

If the foregoing is acceptable to you, kindly so indicate by signing the approval which is endorsed hereon.

Very truly yours,

/s/ Carl L. Mosher
Carl L. Mosher

Approved:

The Narva Harris Construction Corp.

By /s/ Narva L. Harris, Jr.
Narva L. Harris, Jr.

29. The parties agree that plaintiff completed its contract with Center Post and did so at a total cost, exclusive of the air conditioning and fire extinguisher change order items, of $1,180,017 or $101,000 more than the contract price of $1,079,017.

30. On November 8, 1974, Center Post, as mortgagor, and First Federal Savings and Loan Association, as mortgagee and depository, entered into an escrow deposit agreement supplementary to the building loan agreement of September 1, 1971, by which Center Post obtained mortgage financing for the project built by plaintiff.

Under the escrow agreement Center Post deposited $80,836 with First Federal as an inducement to it to advance the entire amount of the mortgage loan ($1,408,100) and to induce FHA to insure the entire amount of that loan. The escrow agreement declared the intention of its signatories (mortgagor and mortgagee-depository) as being that "* * * the Depository shall act solely at all times on instructions from the Federal Housing Administration with respect to the said sum deposited with it by the Mortgagor * * *." One of the terms of the escrow agreement provided:

> Depository shall upon receipt of written approval of the Mortgagor and the Federal Housing Administration return to the General Contractor, without interest, the sum deposited herewith.

31. By a letter of June 25, 1974, Center Post requested HUD to insure an increase in the amount of the original mortgage. The letter explained the justification for the requested increase as follows:

> The basis for the request for the increase was the fact that there were substantial errors in processing on the part of the general contractor and your office in that the unprecedented cost esc[a]lations encountered during the construction of the project—both in terms of wages and materials, could not have been projected by any knowledgeable person in the building or development field. In addition, prior to the initial closing, it had been noted by the contractor that the cost for masonry was substantially less than was being allocated by the Cost Estimation section.

By a letter dated July 10, 1974, HUD rejected the request, stating:

> We have reviewed your letter of June 25, 1974, requesting a mortgage increase for the subject project due to construction cost overruns. Cost increases resulting from inflationary factors may not form the basis for a request for a mortgage increase.
>
> Since your request was predicated upon the effect of these inflationary factors, we cannot consider a mortgage increase for this project.

Although, by a letter of July 15, 1974, Center Post requested HUD to reconsider its rejection, no mortgage insurance increase was granted.

32. On June 27, 1979, First Federal Savings and Loan Association still held $51,636 of the escrow deposit made on November 8, 1974, in the amount of $80,836, as detailed in finding 30, *supra*.

33. The evidence shows that following completion of its contract plaintiff twice called upon Center Post and/or the Medical Center to authorize the depository (First Federal Savings and Loan Association) to release the escrow fund to the general contractor (plaintiff) as provided in the escrow agreement, finding 30, *supra*, and was informed that such authorization would only be given if plaintiff agreed to waive its rights under the $70,000 cost overrun indemnity agreement of September 1, 1971. Finding 28, *supra*.

34. The defendant has adduced no evidence to show that HUD/FHA would have any inclination or reasonable basis to withhold approval of the depository's return of the escrow balance to the general contractor.

35. On January 6, 1977, the trial judge allowed, without objection by defendant, plaintiff's motion under this court's Rule 41 for issuance of a notice to Center Post Housing, Inc., and Presbyterian-University of Pennsylvania Medical Center. On March 31, 1977, after service of the notice on them, those third parties filed a motion to quash. On April 19, 1977, plaintiff having neither objected nor otherwise responded, the motion to quash was allowed.

ULTIMATE FINDINGS OF FACT

36. Plaintiff has failed to prove a breach of any commitment by defendant in respect to the extension of mortgage insurance in No. 422-76.

37. Plaintiff has proved that the construction contract in No. 422-76 was satisfactorily completed and defendant has shown no reason why it should not notify the First Federal Savings and Loan Association of Philadelphia in writing of its approval of the project pursuant to the terms of the escrow agreement by virtue of which that institution held a fund of $28,411 on June 27, 1979.

38. Plaintiff has failed to prove that the defendant induced it to enter into the construction contract in No. 407-76 by representing that if cost overruns were experienced defendant would insure a mortgage larger than that which it insured when the contract was entered into.

39. The parties hereto agree that the construction contract in No. 407-76 was satisfactorily completed and defendant has shown no reason why, upon plaintiff's re-

quest, it should not notify the First Federal Savings and Loan Association of Philadelphia in writing of its approval of the project pursuant to the terms of the escrow agreement by virtue of which that institution held a fund of $51,636 on June 27, 1979.

CONCLUSION OF LAW

For the reasons given, plaintiff is not entitled to recover on count one of either of the petitions herein and they are accordingly dismissed with prejudice. Counts two and three thereof are transferred to the U. S. District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1506.

Order in the United States Court of Claims

IN THE
UNITED STATES COURT OF CLAIMS

Nos. 407-76 and 422-76

THE NARVA HARRIS CONSTRUCTION CORP.

v.

THE UNITED STATES.

Contracts; alleged oral contract; failure of proof of such contract.

APR 21 1981

Charles B. Burr, II, attorney of record, for plaintiff. Griffith and Burr, of counsel.

John Charles Ranney, with whom was Acting Assistant Attorney General Thomas S. Martin, for defendant.

Before DAVIS, KASHIWA and KUNZIG, *Judges.*

ORDER

PER CURIAM: This case now comes before the court on plaintiff's exceptions to Trial Judge Willi's opinion, findings of fact (including ultimate findings of fact), and conclusion of law. The court has heard oral argument and has also considered the parties' written briefs and submissions. On full consideration, we agree with and adopt as our own the trial judge's opinion, findings, ultimate findings, and legal coinclusion (which have already been supplied to the parties). As set forth by the trial judge,

plaintiff has failed to prove the making of the oral contract which has been alleged and which is the necessary basis for any possible recovery in this court. Especially in view of the trial judge's seeing and hearing the witnesses, we have no occasion to disagree with his opinion and findings that the plaintiff failed to prove such an oral contract by credible evidence. Because of that conclusion, there is no need to consider or reach the scope and impact of 31 U.S.C. §200 on the alleged oral contract. Accordingly, plaintiff is not entitled to recover on count one of either of the petitions in these cases and those counts are dismissed. Counts two and three of the petitions are transferred to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1506.

APR 21 1981

IN THE
UNITED STATES COURT OF CLAIMS

May 29, 1981

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties, as set forth, for rehearing, reconsideration or other relief under Rules 151(b) and 152 are DENIED.

168-75 MAE BOURGEOIS

Plaintiff's motion filed May 13, 1981.
(NICHOLS, BENNETT and SMITH, *Judges*)

407-76
and THE NARVA HARRIS CONSTRUCTION
422-76 CORP.

Plaintiff's motion filed May 1, 1981.
(DAVIS, KASHIWA and KUNZIG, *Judges*)

100-77 WILLIAM F. SANGEMINO

Plaintiff's motion filed April 27, 1981.
(FRIEDMAN, *Chief Judge*, KUNZIG and BENNETT, *Judges*)

445-78 INTERNATIONAL ELECTRONICS CORPORATION

Plaintiff's motion filed April 21, 1981.
(FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and KASHIWA, *Judge*)

297-80C HENRY SMIT

Plaintiff's motion filed April 16, 1981.
(FRIEDMAN, *Chief Judge*, DAVIS and KASHIWA, *Judges*)

Office-Supreme Court, U.S.
FILED
SEP 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-139

In the Supreme Court of the United States

OCTOBER TERM, 1980

NARVA HARRIS CONSTRUCTION CORP.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-139

NARVA HARRIS CONSTRUCTION CORP.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims incorrectly held that the Department of Housing and Urban Development did not breach a contract in refusing to increase the amount of mortgage insurance covering two construction projects completed by petitioner.

1. Petitioner, a general contractor, entered into negotiations in 1970 with Center Post Housing, Inc. (Center Post), the Presbyterian-University of Pennsylvania Medical Center (Medical Center), and representatives of the Department of Housing and Urban Development (HUD) regarding construction of the Center Post Housing Project and renovation of the Kemble Park Apartments, two low-income housing developments in Philadelphia (Pet. App. 26). The Center Post project was to be financed by a federally insured mortgage loan to Center Post, a wholly-owned

subsidiary of the Medical Center (*id.* at 23, 31-33). The maximum insurable mortgage was determined by HUD from figures supplied in part by petitioner (*id.* at 27, 31-32).

Prior to signing the contract, petitioner told HUD officials that the approved insurable mortgage was insufficient to complete the project (Pet. App. 26-27). At a meeting attended by petitioner, the Medical Center and HUD officials in April 1971, HUD officials explained that under applicable regulations there were only two ways the insured mortgage amount could be increased (*id.* at 28). One was by means of "change orders," which were used on three occasions to increase the amount of approved mortgage insurance on the Center Post project.[1] The other method for raising insurance limits, called "error in processing," is utilized when HUD makes a computational error that goes unnoticed during initial review procedures (*id.* at 28-29). As for this second method, the court below noted (*id.* at 29):

> The record includes the referenced error in processing regulations. These regulations, which are unpublished but are routinely made available to an interested party on request, expressly disapprove mortgage insurance increases to compensate for additional costs except where necessary to "correct substantial error in the original processing" * * *.

On May 18, 1971, Narva Harris, one of the petitioner's three owners, wrote a letter to counsel for the Medical Center, stating in part (Pet. App. 31):

> We agreed at * * * [the April meeting] that [HUD] would probably compensate us for any excess when the job is completed based on our certified costs. In the

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[1]The approved mortgage insurance amount was increased to cover the costs of changes in construction specifications calling for air conditioning, window guards and fire extinguishers (Pet. App. 29).

> event they do not, however, we agreed that the Hospital would guarantee me the difference provided I agreed to lower the builder's fee by 1 percent, thereby absorbing my share of the overage.

On September 1, 1971, petitioner entered into a contract with Center Post to construct the Center Post Housing Project (Pet. App. 32). After the project was completed, it was discovered that the certified costs exceeded the amount of the insured mortgage (*id.* at 34). Center Post requested that HUD raise the mortgage insurance amount to reflect the increased cost of the project (*id.* at 35). HUD denied this request (*id.* at 36).

2. Petitioner brought two companion suits against HUD, each alleging breach of contract in connection with one of the two construction projects, in the Court of Common Pleas of Philadelphia County. The suits were removed, on the government's motion, to the United States District Court for the Eastern District of Pennsylvania, which subsequently transferred them to the United States Court of Claims pursuant to 28 U.S.C. 1406(c). Following trial, that court found that petitioner's claim relating to the Kemble Park Apartments renovation "must fail because of an almost complete failure of proof" (Pet. App. 17). No evidence was adduced to "indicate that cost overruns were in fact experienced, [or that] HUD was even asked, much less refused to insure a mortgage larger than that approved for the project at its inception" (*ibid.*). As for the Center Post project, the court found that the evidence shows "both (1) that no HUD official promised [petitioner] that cost overruns on the Center Post housing project would be accommodated by an increase in the insured mortgage by which the project was originally funded, * * * and (2) that, accordingly, [petitioner] looked to Center Post, not HUD, to indemnify it against the impact of cost overruns on its

fixed-price contract" (*id.* at 18). "In sum," the court concluded, "the evidence does not show that HUD's failure to insure increased mortgages on either of the construction projects involved in those two consolidated cases amounts to a breach of contract" (*ibid.*).[2]

3. The Court of Claims correctly rejected petitioner's fact-bound contentions, holding that petitioner "has failed to prove the making of the oral contract which has been alleged and which is the necessary basis for any possible recovery in this court" (Pet. App. 40). Further review is therefore unwarranted.

Petitioner first contends (Pet. 4-10) that the Court of Claims made a factual error in not finding that certain HUD officials stated or implied that if there were a certified cost overrun HUD would increase the level of mortgage insurance. The court below found no credible evidence in the record to support petitioner's assertion (Pet. App. 29), and such a factual issue does not warrant further consideration by this Court.[3] However, even assuming arguendo that the representations alleged by petitioner were made by the HUD officials, the court was nonetheless correct in finding no breach of contract. Such an increase in the mortgage insurance amount is not sanctioned by the applicable regulations (*ibid.*), and it is well settled that the federal government is not bound or estopped by the statements of

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[2]Two other counts in each of the petitions below, dealing with issues not here relevant, were ultimately transferred to the United States District Court for the Eastern District of Pennsylvania, pursuant to 28 U.S.C. 1506 (Pet. App. 40).

[3]Similarly, petitioner's contention (Pet. 12-13) that it "adduced sufficient evidence from which a meeting of the minds could reasonably be inferred to support a finding of a contract implied-in-fact" (*id.* at 12) relates to the sufficiency of the evidence presented, an issue not warranting review by this Court.

its agents made outside the scope of their lawful authority. See, *e.g., Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981).

Petitioner next asserts (Pet. 8-10) that the government was equitably estopped from denying the existence of the contractual agreement. The Court of Claims found, however, that petitioner did not prove that it relied on any conduct of HUD officials (Pet. App. 37). During the contract negotiations, petitioner expressly sought assurance from the Medical Center that if HUD did not grant the mortgage increase the Medical Center would guarantee the difference (*id.* at 31). As the court below correctly noted, petitioner's letter to the Medical Center "dispels the notion that [petitioner] undertook the project in reliance on a solid expectation that if its actual costs exceeded its projections [HUD] would increase its mortgage guarantee to make up the difference" (*ibid.*).

Finally, petitioner argues (Pet. 11) that "an unenforceable oral contract does not prevent a recovery in *quantum meruit* for the value of services rendered." However, in order to recover in *quantum meruit*, petitioner must show performance of additional services in excess of those required of it by the terms of an existing contract with the government. *Allstates Van Lines Corp.* v. *United States*, 215 Ct. Cl. 1075 (1978). Petitioner never had a contract with the government. The contractual agreement executed by petitioner with Center Post specified petitioner's compensation and set forth the terms upon which Center Post, not the government, would provide additional compensation due to increased costs. Furthermore, petitioner's completion of the housing project was not "in excess" of the services required of it by its contract with Center Post (*ibid.*). Hence, this argument as well must fail.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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